Natural Gas Policy Act of 1978, 15 U.S.C. 3301–3432).

In consideration of the foregoing, Parts 273 and 275 of Subchapter H, Chapter I, Title 18, Code of Federal Regulations, are amended as set forth below, effective immediately.

By the Commission.

Kenneth F. Plumb,

Secretary.

PART 275—COMMISSION DETERMINATIONS AND REVIEW OF JURISDICTIONAL AGENCY DETERMINATIONS

§ 275.202 [Amended]

1. Section 275.202 is amended in paragraph (a) by deleting the phrase, "Except as provided in paragraph (b) of this section" and by substituting in lieu thereof the phrase, "Except as provided in paragraphs (b), (c) and (d) of this section".

2. Section 275.202(b) is amended by revising subparagraph (2) to read as follows:

§ 275.202 Commission review of final determinations.

* * * * *

(b) *Incomplete notice.* Notwithstanding the provisions of paragraph (a) of this section, the 45-day period for Commission review of a determination shall not begin if:

* * * * *

(2) The Commission notifies the jurisdictional agency, the purchaser and the parties to the proceeding before the jurisdictional agency, within 45 days after the date on which the Commission receives notice of the determination, that the notice is incomplete.

* * * * *

§ 275.202 [Amended]

3. Section 275.202 is amended by redesignating paragraph (c) as paragraph (e); paragraph (d) as paragraph (f); paragraph (e) as paragraph (g); and by inserting new paragraphs (c) and (d) to read as follows:

* * * * *

(c) *Withdrawal of Notice.* (1) The jurisdictional agency may withdraw a notice of determination by giving notice as specified in paragraph (c)(2) of this section at any time prior to the issuance of a final order with respect to such determination under paragraphs (g)(1) and (g)(2) of this section, or at any time prior to the date such determination becomes final under paragraphs (a) or (g)(4) of this section. Such notice shall include the jurisdictional agency's reasons for the withdrawal.

(2) Withdrawal of a notice of determination shall take effect at such time as the jurisdictional agency has notified the Commission, the parties to the proceeding before the agency, and the purchaser of such withdrawal.

(3) Withdrawal of a notice of determination shall nullify such notice of determination.

(d) *Withdrawal of Application.* (1) An applicant may withdraw an application for a determination which is before the Commission by giving notice as specified in paragraph (d)(2) of this section at any time prior to the issuance of a final order with respect to such determination under paragraphs (g)(1) and (g)(2) of this section, or at any time prior to the date such determination becomes final under paragraphs (a) or (g)(4) of this section.

(2)Withdrawal of an application shall take effect at such time as the applicant has notified the Commission, the jurisdictional agency and the purchaser.

(3) Withdrawal of an application shall nullify such application and the notice of determination on such application.

(4) The applicant's right to make interim collections under Part 273 of this Chapter shall cease and the refund obligations of Part 273 of this chapter shall begin when the withdrawal takes effect under this paragraph.

PART 273—COLLECTION AUTHORITY; REFUNDS

§ 273.203 [Amended]

3. Section 273.203 is amended in paragraph (b)(2)(ii) by deleting "§ 275.202(e)" and by substituting in lieu thereof "275.202(g)".

[FR Doc. 79-35868 Filed 11-20-79; 8:45 am]

BILLING CODE 6450-85-M

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18 CFR Part 284

[Docket No. RM79-75]

Certain Sales and Transportation of Natural Gas Policy Act of 1978 and Related Authorities; Order on Rehearing of Order No. 46

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order on Rehearing of Order No. 46.

SUMMARY: The Federal Energy Regulatory Commission (Commission) amended its regulations to provide (1) for pipelines to make requests for interpretation of rate questions from the Commission's Office of General Counsel, and (2) for automatic approval of an intrastate pipeline's proposed transportation rate unless the Commission acts with 150 days of the receipt of the intrastate pipeline's rate application.

EFFECTIVE DATE: Effective December 14, 1979.

ADDRESSES: All filings should reference Docket No. RM79-75 and should be addressed to: Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426.

FOR FURTHER INFORMATION CONTACT: Robert Platt, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capital Street, N.E., Washington, D.C. 20426 (202) 357-8454.

Federal Energy Regulatory Commission

Issued: November 14, 1979.

On August 30, 1979, the Federal Energy Regulatory Commission (Commission) issued Order No. 46, which contained the final rules implementing sections 311(a) and 312 of the Natural Gas Policy Act of 1978 (NGPA) 15 U.S.C. 3301 *et seq.* Section 311(a)(1) allows the Commission to authorize an interstate pipeline to transport natural gas on behalf of an intrastate pipeline or a local distribution company. Section 311(a)(2) allows the Commission to authorize an intrastate pipeline to transport natural gas on behalf of an interstate pipeline company or a local distribution company served by an interstate pipeline. Section 312 allows the Commission to authorize an intrastate pipeline to assign its surplus natural gas to an interstate pipeline or a local distribution company. Four applications for rehearing of Order No. 46 have been received, from the Railroad Commission of Texas (RR Commission), Texas Gas Transmission Corporation (Texas Gas), East Tennessee Natural Gas Company (East Tennessee) and Delhi Gas Pipeline Corporation (Delhi).

The RR Commission and Delhi object to the definition of "appropriate state regulatory agency." [1] Both are uncertain as to whether the RR Commission falls within the scope of this definition.

In its motion filed September 28, 1979, the RR Commission states that it is required by statute to insure that jurisdictional rates are just and reasonable; that is, the utility shall be able to recover its operating expenses and earn a reasonable return on investment. Since the RR Commission's jurisdiction extends to city-gate service and transportation by intrastate

[1] That term was defined in § 284.128 in the interim rules, and in § 284.1(b) in the final rules. There is no substantive difference between the interim and final definitions.

pipelines, it appears that the RR Commission is an "appropriate state regulatory agency" within the meaning of § 284.1(b), at least insofar as it sets city-gate transportation rates. Based on our understanding of the RR Commission's operations, we find that the city-gate natural gas transportation rates set by the RR Commission are derived by applying a costing methodology such that the use of those rates for similar transactions under section 311(a)(2) will satisfy the statutory requirement that the rates are "fair and equitable" and not in excess of "an amount which is reasonably comparable to the rates and charges which interstate pipelines would be permitted to charge." See section 311(a)(2)(B)(i).[2]

Further, both the RR Commission and Delhi object to the use of the "cost-of-service" standard in the definition on the ground that the phrase is too vague. We will retain the standard, but will clarify its meaning.

The standard is intended to encompass those transportation rates which are set by a state regulatory agency under a methodology which considers the cost of providing the service rather than the price the service can demand. By cost we intend to include operating costs as well as a reasonable return on investment. If there is no rate setting review based upon the cost of providing the service, the rate is not "cost-based", and the agency setting the rate will not qualify under this definition. However, it is not intended that the methodologies utilized by the FERC are the only ones that can be deemed "cost-of-service." Any methodology that involves rate setting based on the cost of providing the service should satisfy the standard.[3]

Besides objection to the "cost-of-service" standard used by the Commission in implementing section 311(a)(2)(B)(i) in § 284.123, Delhi objects to using this approach for purposes of setting the transportation rates for services provided by the intrastate pipeline "in connection" with section 311(b) sales. (Section 311(b) allows the Commission to authorize an intrastate pipeline to sell natural gas to an interstate pipeline or local distribution company. Section 311(b)(2)(B) requires the Commission to set, by rule, a method for computing the compensation due an intrastate pipeline for services rendered in connection with the sale.) Specifically, Delhi contends that the fair and equitable standard under section 311(a)(2)(B)(i) for setting section 311(a)(2) transportation rates differs from the statutory standards for setting the rates for services rendered in connection with section 311(b) sales, and thus the approach of § 284.123 need not be used for section 311(b) sales.

However, the language of section 311(b)(2)(B) is very similar to the language used in section 311(a)(2)(B)(ii). (Section 311(a)(2)(B)(ii) addresses the rates to be charged for services "connected" with the section 311(a)(2) transaction just as section 311(b)(2)(B) governs section 311(b) "connected" service rates). Both used the phrases "reasonably compensate" and "reasonable profit." In promulgating rules under these sections, we determined that it is reasonable to set rates under both sections by reference to the "fair and equitable" standard [4] set forth in § 284.123. We will adhere to that view.

In addressing another aspect of § 284.123, Delhi made an incorrect inference based on Order No. 46's amendment to the language in § 284.123(b)(2). Delhi inferred that by allowing for an affirmative Commission order approving a section 311(a)(2) rate, the Commission has "dramatically shifted * * * the burden of going forward in a rate proceeding. * * *" Such is not the case; the final rule did not place any additional burdens on the intrastate pipeline. The intrastate pipeline which makes a rate filing under § 284.123(b)(2) can begin the transaction prior to Commission review, as it could under the interim rule. It must file "information showing that the proposed rates and charges are fair and equitable," as was required under the interim rule. And, as in the interim rule, the Commission cannot disapprove the rate without "affording notice and opportunity for oral presentation of views, data and arguments." Thus, providing for the specific approval of the rate should work to the advantage of the intrastate pipeline, because such approval would eliminate any uncertainty concerning the possibility that the Commission will later disapprove the rate and order a refund under § 284.2(a).

However, the Commission has determined that a specific order should not be required to give the necessary rate certainty. Accordingly, § 284.123(b)(2) has been amended to provide that unless the Commission acts [5] within 150 days of the date on which the Commission received notice of the proposed rate, an application filed under § 284.123(b)(2) will be deemed approved.[6] Once the rate is deemed approved, the intrastate pipeline will not be subject to any retroactive refund obligation for failure of the rate charged to comply with the requirements of § 284.123(b)(2). However, the Commission can prospectively revoke its approval (or deemed approval) of the rate at any time.

Delhi also objected to our rejection, on page 4 of the Order No. 46, of the request that "if authorization under section 311(a) is found not to exist the parties to such a transaction be allowed to cease operations without having [Natural Gas Act] jurisdiction attach if the transaction was entered into in good faith."

Our position on this matter will not be changed. The Commission has jurisdiction under the Natural Gas Act over all companies engaged in the transportation or sale of natural gas in interstate commerce unless the company is exempted by some statutory provision. Section 601 of the NGPA grants such an exemption if the transaction is authorized by the Commission under section 311 or 312. However, if the transaction is not authorized under section 311 or 312, section 601 does not apply, and Natural Gas Act jurisdiction attaches. The statutory exemption in section 601 does not mention "good faith." Thus, the Commission has no authority to exempt from Natural Gas Act jurisdiction a party who, through a good faith mistake, engages in a jursidictional activity.

Finally, Delhi objects to § 284.163(b), which limits the price that can be paid under a self-executing section 312 assignment. The limit in both the interim and final rule is the section 102 maximum lawful price for new natural gas. Delhi requests that it be allowed to self-execute assignments priced up to

[2] An additional point should be stressed: if a state agency makes no review of the cost of a particular service, the rate for that service would not qualify as being set on a cost-of-service basis. Thus, a state regulatory agency may be "appropriate" within the meaning of the definition for some rates under its jurisdiction, but not for others.

[3] City-gate rates to distribution companies tend to be cost-based whether or not they are regulated under a specific tariff. It was with this in mind that the words "city-gate" were inserted in § 284.123(b)(1)(i) (A) and (B). Likewise, the word "comparable" in § 284.123(b)(ii) is intended to refer to city-gate service; a delivery of natural gas directly to an industrial user would not qualify as a "comparable" service.

[4] On page 107 of the Joint Explanatory Statement of the Committee on Conference the term "fair and equitable" is used in describing the total rate to be charged under section 311(b).

[5] The Commission can act by extending the 150 day period, or by instituting a proceeding to examine the rate more fully.

[6] For section 311(a)(2) rates set in accordance with § 284.123(b)(1), as well for any section 311(a)(1) rates, the transporting pipeline may request an interpretation pursuant to § 1.42 of our regulations regarding whether the rate complies with the regulations. Section 284.6 has been included in Subpart A to specifically provide for these interpretations.

the section 102 ceiling plus state severance taxes. The Commission will maintain this ceiling price for self-executing assignments because we continue to believe that relatively expensive natural gas assignments should receive scrutiny. We have chosen as the appropriate cut-off point for scrutiny the section 102 maximum lawful price. The price set for section 102 gas provides a reasonable point for defining "relatively extensive natural gas assignment" for the purpose of determining which transactions to examine. Moreover, it is administratively useful in a way the suggested figure is not. The section 102 price type of figure is uniform throughout the country and is thus administratively simple to apply in selecting which transaction to examine. If our future experience in this area indicates a need to set a higher cut-off point for self-executing assignments, we can do so in the future. Under the present rule higher priced assignments can go forward after Commission approval and this approval will be required for transactions which exceed the section 102 price with no additions.

The two other issues raised in the applications for rehearing involve section 311(a)(1) transportation by interstate pipelines. Texas Gas requests that the Commission allow budget-type construction authorization for facilities that must be constructed to effectuate a section 311(a)(1) transaction. The Commission has permitted such authorization with respect to facilities that are jurisdictional under the Natural Gas Act, in its final rules issued on November 1, 1979, in consolidated Docket Nos. RM79-37 and RM79-43.

Finally, East Tennessee states that the "flowback" rule of § 284.103(d) does not take into account the special circumstances of those interstate pipelines which also perform services which are not subject to the jurisdiction of the Commission under the Natural Gas Act.[7] East Tennessee suggests that the Commission should allow a pipeline with "jurisdictional" and "nonjurisdictional" customers to allocate the revenue between the two, and flow back through Account 191 only the revenues attributable to the jurisdictional customers.

The Commission agrees that such an allocation is proper. The Commission rules require that the interstate pipeline credit only that portion of the revenues (in excess of 1 cent per MMBtu) properly allocable to its jurisdictional customers. The allocation should, as a general matter, be based on the pipeline's ratio of (1) sales for resale subject to regulation under the Natural Gas Act, to (2) total sales, on a monthly basis.

The amendments to the Part 284 regulations which are contained in this Order on Rehearing have been reached after consideration of the comments on these rules received under Docket No. RM79-3, and in consideration of the above referenced applications for rehearing. Accordingly, we find that further notice and public procedure is unnecessary and impracticable and that good cause exists to dispense with additional public procedure and to issue these amendments as final rules.

(Natural Gas Act, as amended, 15 U.S.C. 717 *et seq.*, Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*, Department of Energy Organization Act, 42 U.S.C. 7101, *et seq.*, E.O. 12009, 42 FR 46267)

In consideration of the foregoing, Subparts A and C of Part 284 of Subchapter I, Chapter I, Title 18, Code of Federal Regulations, are amended as set forth below, effective 30 days from the date of issuance of this order.

By the Commission.

Kenneth F. Plumb,

Secretary.

1. Subpart A of Part 284 is amended by adding a new section to read as follows:

§ 284.6 Rate interpretations.

(a) *Procedure.* A pipeline may obtain an interpretation pursuant to § 1.42 of this chapter concerning whether particular rates and charges comply with the requirements of this Part.

(b) *Address.* Requests for interpretations should be addressed to: FERC Part 284 Interpretations, Office of General Counsel, Suite 8000, 825 North Capitol Street, Washington, D.C. 20036.

2. Section 284.123 is amended by deleting subparagraph (b)(2) and inserting the following in lieu thereof:

§ 284.123 Rates and charges.

* * * * *

(b) *Elections.*

* * * * *

(2)(i) If an intrastate pipeline does not choose to make any election under paragraph (b)(1), of this section it shall apply for Commission approval, by order, of the proposed rates and charges by filing with the Commission the proposed rates and charges, and information showing the proposed rates and charges are fair and equitable. Upon filing the petition for approval, the intrastate pipeline may commence the transportation service and charge and collect the proposed rate, subject to refund.

(ii) 150 days after the date on which the Commission received an application filed pursuant to paragraph(b)(2)(i) of this section, the rate proposed in the application will be deemed to be fair and equitable and not in excess of an amount which interstate pipelines would be permitted to charge for providing similar transportation service, unless within the 150 day period, the Commission either extends the time for action, or institutes a proceeding in which all interested parties will be afforded an opportunity for written comments and for the oral presentation of views, data and arguments. In such proceeding, the Commission either will approve the rate or disapprove the rate and order refund, with interest, of any amount which has been determined to be in excess of those shown to be fair and equitable or in excess of the rates and charges which interstate pipelines would be permitted to charge for providing similar transportation service.

(iii) A Commission order approving or disapproving a transportation rate under this subparagraph supersedes a rate determined in accordance with paragraph (b)(1) of this section.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Parts 1625 and 1627

Age Discrimination In Employment; Final Interpretations

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final interpretations.

SUMMARY: On July 1, 1979, pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 (May 9, 1978), responsibility and authority for enforcement of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621, 623, 625, 626-633 and 634 (ADEA) was transferred from the Department of Labor to the Equal Employment Opportunity Commission. The Commission assumed enforcement of the ADEA on that date. Prior to the transfer of authority which occurred on July 1, 1979, the Department of Labor published for comment in the **Federal Register** proposed amendments to their existing interpretations of the ADEA. These proposed amendments included sections entitled "Exemption for certain tenured employees at institutions of higher learning" and "Exemption for

[7] Section 284.103(d) requires all but one cent of section 311(a)(1) transportation revenues to be credited to the interstate pipeline's Purchased Gas Adjustment account, Account 191.

certain executive and high policymaking employees." Insofar as those sections have already been published for public comment, they are herein published as final interpretations of the Commission with certain changes made by the Department of Labor after careful consideration was given to the written comments on the proposed amendments.

EFFECTIVE DATE: Since the following final agency interpretations are interpretive rules or statements of policy, the 30-day delay in effective date as prescribed in Section 553(d) of Title 5 U.S. Code, does not apply. Accordingly, these interpretations are effective November 21, 1979.

FOR FURTHER INFORMATION CONTACT: John Pagano, Office of the General Counsel, Legal Counsel Division, Equal Employment Opportunity Commission, 2401 E Street, NW., Room 2254, Washington, D.C. 20506, telephone (202) 634-6595.

SUPPLEMENTARY INFORMATION: On December 12, 1978, prior to the transfer of authority to the EEOC, the Department of Labor published its proposal to add new § 860.98 (now § 1625.11) to the Interpretive Bulletin in order to set forth the Department's interpretation of section 12(d) of the Act, which took effect on January 1, 1979, when the maximum age of individuals in the private sector and non-Federal public sector protected by the Act was extended from age 65 to 70. *See* 43 FR 58154-58156. Section 12(d) provides a temporary exemption for newly-protected employees, serving under a contract or similar arrangement of unlimited tenure, at an institution of higher education. The statutory text provides:

> (d) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965).

As provided by section 3(b)(3) of the 1978 amendments, this exemption is repealed on July 1, 1982. The proposal took the position that an individual would not be subject to the exemption if the individual is employed by an institution of higher education as of July 1, 1982, regardless of whether his or her duties for the current academic year ceased before that date. The proposal also took the position that receipt of regular salary and employee benefits (except retirement benefits) would be treated as conclusive proof of an employment relationship.

After reviewing the comments and reconsidering these proposed positions, the Department of Labor, with present concurrence from the EEOC, decided that modifications are necessary. The underlying problem raised by the comments relating to the July 1, 1982 repeal date is that where a tenured employee reaches age 65 before July 1, the contract (or similar arrangement) providing for unlimited tenure sometimes does not expire until a month or two after that date, even though the employee is no longer "serving" under the contract (or similar arrangement) because all job duties and responsibilities have ceased prior to July 1.

This situation usually occurs because the college or university's 12-month fiscal year ends on July 31 or even August 31, instead of on June 30, which is the typical end of the fiscal year at many, if not most, institutions. Mandatory retirement (and the concomitant cessation of tenure) is usually effective at the end of the fiscal year, largely as a matter of administrative convenience.

However, even where an employee who reaches age 65 prior to July 1 enjoys tenured status for a month or two thereafter before mandatory retirement, that employee would in most instances have no duties or responsibilities imposed by the college or university after commencement (or after papers and examinations have been graded) in May or June. The individual need not maintain office hours, attend committee meetings, conduct classes or seminars, or even be present on campus. Where a tenured employee with such freedom has attained age 65 before July 1, 1982, he or she cannot truly be said to be "serving" under a contract (or similar arrangement) providing for unlimited tenure, within the meaning of the exemption. The statutory requirement that the employee be "serving" under such a contract (or similar arrangement) obviously contemplates that the employee have certain duties or responsibilities which he or she is obligated to fulfill.

Where a tenured employee has reached age 65 and has ceased all job duties and responsibilities prior to July 1, 1982, it makes no sense that the exemption should apply or not apply, as the case may be, solely because the date on which tenure ceases (that is, the last day of the institution's fiscal year) may be a month or two after June 30 instead of on June 30. This view is confirmed by the legislative history. In the conference committee meeting on March 2, 1978, the conferees initially reached tentative agreement that the exemption would be repealed three years after the age cap was raised from 65 to 70. However, it was noted that such a repeal would occur on January 1, 1982, before the tenured employee's duties would have ceased for that academic year. The conferees therefore agreed upon July 1, 1982 as the date of repeal, thereby allowing a tenured employee who reaches age 65 at any time through June 30, 1982 to fall within the exemption, if his or her duties had ceased by that time.

In order to effect the change described above, proposed § 1625.11(a)(2) has been revised.

On a related matter, just as tenured status may extend a month or two past the cessation of job duties and responsibilities, so too may salary payments and entitlement to fringe benefits (apart from retirement benefits). This often occurs because the individual has chosen to be paid in 12 installments, rather than in nine, or that the benefit plan provides for coverage of a retiring employee for a certain period after actual retirement (*e.g.*, 30 or 60 days). Moreover, as discussed above, even if the individual is still technically an "employee" for a brief period after July 1, 1982, he or she may not be "serving" under a contract (or similar arrangement) providing for unlimited tenure. In light of these considerations, the reference to salary and employee benefits as conclusive proof of an employment relationship has been removed.

Another principal problem of interpretation presented by this exemption was whether the word "employee" in Section 12(d) should be restricted to those whose sole (or at least primary) duty is teaching or should include such people as research staff, deans, etc. The concept of tenure has traditionally been applied to teachers as a means of assuring academic freedom. On the other hand, when the exemption emerged from the Senate Committee, there was a companion provision exempting tenured "teachers" employed by a local educational agency of a state (*see* S. Rept. No. 95-493, p. 9). Failure to use the same word in Section 12(d), which instead specifies "*any* employee" (emphasis added), suggests that a broader application of the exemption was in fact intended with regard to institutions of higher education. Indeed, although the Senate floor debates refer largely to "teachers", there is also discussion of the exemption as applying to all tenured "faculty members" (*see* 123 Cong. Rec. S17278-S17295). This is reflected in the Conference Committee

Report, which states that the exemption permits the mandatory retirement of "faculty members" (H.R. Rept. No. 95-950, p. 10), as well as in the statements of the House and Senate floor managers (124 Cong. Rec. H2270, S4449). While faculties may differ from one institution to another, they are usually comprised of those groups of employees who are eligible to receive "tenure." Moreover, while teachers do constitute the largest group of employees eligible for tenure at any institution of higher education, certain other groups (such as academic deans, scientific researchers, professional librarians and counselling staff) are frequently also eligible. *See*, e.g., Commission of Academic Tenure in Higher Education, *Faculty Tenure* (San Francisco: Jossey-Bass, Inc., Publishers, 1973), p. 77.

In light of this legislative history and these facts, the Department of Labor's proposed interpretation did not limit the exemption solely to teachers who meet the tenure requirements. None of the commenters objected to this position, and the final interpretation adopts it without change.

Another major problem arose with regard to the phrase "unlimited tenure," which is not defined in the Act. The Department of Labor's proposed interpretation adopted the almost universally accepted definition of academic "tenure" set forth in the 1940 Statement of Principles on Academic Freedom and Tenure, jointly adopted by the Association of American Colleges and American Association of University Professors. *See Faculty Tenure, supra*, pp. 251-252. *See also AAUP Policy Documents and Reports*, 1977 edition (American Association of University Professors, Washington, D.C.), p. 2. No commenters objected to this approach.

The commenters were divided as to whether the Commission, in addition to adopting the basic definition of tenure in the 1940 Statement of Principles, should also adopt the detailed minimum standards for tenure set forth in the 1940 Statement of Principles and described therein as "acceptable academic practice." The legislative history of the exemption shows clear Congressional recognition that there are certain rights and privileges associated with tenure. Senator Chafee, who introduced the measure, referred to a wide range of policies and practices, such as the important requirement that an institution must "prove incompetence or just cause" before discharging a tenured employee (123 Cong. Rec. S17286; *see also* 123 Cong. Rec. S17279, S17287). Although the legislative history does not contain a comprehensive list of the minimum standards required for a tenure system to qualify under the exemption, the standards specifically discussed in the floor debates indicate that the sponsors had in mind the most widely accepted detailed standards as set forth in the 1940 Statement of Principles. The Department of Labor therefore adopted those standards in the proposed interpretation.

Some commenters nevertheless objected to the explicit reference to and quotation from the 1940 Statement of Principles. Their primary objection was that, although the 1940 Statement has been adopted or endorsed by the overwhelming majority of institutions of higher education, some institutions of higher education maintain tenure policies or practices which are substantially different. Moreover, these commenters expressed a concern that even a slight variance from the standards set forth in the 1940 Statement of Principles would be deemed sufficient to deny the exemption.

Where an institution of higher education has tenure policies or practices which are substantially different from the 1940 Statement of Principles, an employee of the institution will not be deemed to be serving under a contract of "unlimited tenure" within the meaning of the Section 12(d) exemption. However, the Commission's proposal was not intended to require an institution to follow the 1940 Statement of Principles to the letter, in order for the exemption to apply. The proposed interpretation merely noted that arrangements which "meet [the detailed minimum standards] will *** satisfy the tenure requirements of the exemption." In order to make clear that these detailed minimum standards need not necessarily be met in every particular aspect, a new paragraph has been added to the final interpretation, in which the views set forth above are expressly stated.

The proposed interpretation also dealt with the issue of whether employees who fall within the exemption may be offered a change in position or status, which is short of forced retirement, and which therefore allows them to remain as employees. The statutory text by its terms excuses only "compulsory retirement." However, if this language were interpreted literally, it would lead to the anomalous result that an employer having an employee within the exemption would be able to force the employee to retire, but would not be able to offer the employee nontenured status or (in the case of a full-time employee) a part-time position. Neither the Department of Labor nor the EEOC believe that the exemption was intended to lead to such a situation. In light of these considerations, where an employee falls within the exemption, the Commission will not question a conversion to part-time status or other change in position or status short of forced retirement: *Provided*, That the employee voluntarily accepts this new position or status, and that he or she is treated no less favorably than similarly situated younger employees. The proposed interpretation reflected this position.

The commenters generally agreed with this position. However, several suggested that the interpretation be modified so that an individual within the exemption who voluntarily accepts a nontenured position could be forced to retire thereafter on the basis of age. The Commission does not adopt the suggested change in the final interpretation. While the exemption does not require an institution of higher education to offer an employee a nontenured position or status in lieu of compulsory retirement, neither does it permit discrimination on the basis of age against an employee who accepts such employment from the institution.

The Department of Labor published its proposal to add a new subsection (c) to § 850.1 (now § 1627.1, *see* 44 FR 38459 (July 2, 1979)) and a new § 850.17 (now § 1627.17, *see* 44 FR 38459 (July 2, 1979)) to the Regulations under the ADEA, and its proposal to add a new § 860.97 (now § 1625.12) to the Interpretative Bulletin on the ADEA on December 12, 1978 (*see* 43 FR 58148). The purpose of these additions is to take account of an exemption in Section 12(c) of the Act which took effect on January 1, 1979, when the maximum age of individuals in the private sector and the non-Federal public sector protected by the Act was extended from age 65 to age 70. The exemption is as follows:

(c)(1) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $27,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions,

such benefit shall be adjusted in accordance with regulations prescribed by the Secretary, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

Paragraph (1) of the exemption describes the types of employees who fall within it; paragraph (2) requires that the Commission issue regulations indicating how the $27,000 annual retirement benefit is to be calculated under specified circumstances. The final regulation with respect to paragraph (2) is contained in new subsection (c) to § 1627.1 and new § 1627.17.

With regard to § 1627.1(c), the proposed regulation as originally published set forth the purpose and scope of the regulation in § 1627.17. There are no changes in § 1627.1(c).

With regard to §§ 1627.17 (a) and (b), the proposed regulation as originally published merely set forth the text of the exemption in Section 12(c) of the Act. This remains unchanged in the final regulation.

With regard to § 1627.17(c), the proposed regulation took the position that an employee, in order to fall within the exemption, must have the option of in fact receiving, during each year of his or her lifetime following retirement, at least $27,000 per year (exclusive of amounts attributable to Social Security, employee contributions, rollover contributions and contributions of prior employers). (A retirement benefit which excludes amounts attributable to these sources is sometimes referred to herein as a "qualified" retirement benefit.) This requirement was deemed met where the employee has the option of receiving, during each year of his or her lifetime following retirement, an annual payment of at least $27,000, or periodic payments on a more frequent basis which, in the aggregate, equal at least $27,000 per year. The requirement was also deemed met where the employee has the option of receiving, upon retirement, a lump sum payment with which it is possible to purchase a single life annuity (with no ancillary benefits) yielding at least $27,000 per year.

Where an employee who has any of the options described above instead freely selects still another available option (or options) providing for payments after his or her death, the proposed regulation took the position that the value of these payments may be included in determining whether all of the retirement benefits are actuarially equivalent to a single life annuity (with no ancillary benefits) of at least $27,000 per year. On the other hand, where an employee has no choice but to have certain benefits provided after his or her death, the value of these benefits may not be included in this determination.

This approach was intended to assure that "no employee who is required to receive less than $27,000 per year during his or her lifetime in retirement (because of other benefits being provided only after death) will fall within the exemption." 43 FR 58149 (Dec. 12, 1978).

Several commenters pointed out that the proposed regulation would exclude from the calculation of the $27,000 retirement benefit those amounts which are derived from many unfunded deferred compensation plans. Such plans encompass a wide variety of arrangements under which compensation to an employee for past or current service is postponed to some future date. Such a plan often does not provide a single life annuity option but instead provides for a specified number of annual installments. Nor does a deferred compensation plan typically provide for a lump sum payment, because of adverse tax consequences.

Section 12(c)(1) of the Act expressly provides that the calculation of qualified retirement benefits includes, *inter alia*, benefits from a "deferred compensation plan." Inasmuch as the proposed regulation would in many if not most instances exclude benefits from such plans, the final regulation has been changed slightly in order to avoid writing such plans out of the exemption. Under the new test, where an employee is entitled to benefits from a deferred compensation plan, it is permissible to count the following amount toward the $27,000 test: The aggregate value of the employer's contributions, as of the date of the employee's retirement, with respect to those installment payments which are scheduled to be made within the period of life expectancy of the employee.

With regard to § 1627.17(d), the proposed regulation, in accord with the language and legislative history of Section 12(c)(1) of the Act, took the position that the only retirement benefits which may be counted towards the $27,000 annual benefit are those from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans. The value of benefits from any other employee benefit plan, such as health or life insurance, could therefore not be counted.

The comments raised a question as to whether an employer could supplement the retirement benefits payable to an employee in order to reach the $27,000 annual benefit level necessary to claim the exemption. Under the proposed regulation, this issue was not specifically addressed. Under the final interpretation, the only benefits which may be counted are those authorized by and provided under the terms of a pension, profit-sharing, savings, or deferred compensation plan. Benefits from other sources, or provided under other plans, cannot be counted. The reason for this limitation is that these are the only plans referred to by the statutory language.

Another issue not specifically addressed by the proposed regulation was whether an employee may unilaterally withdraw employer contributions from a plan in order to avoid receiving a $27,000 annual retirement benefit, if such withdrawals are authorized by the plan's terms. To present such a practice at least partially, some commenters have recommended that the proposed regulation be changed to exclude from the calculation of qualified retirement benefits all supplemental payments by employers or contribution withdrawals by employees which occur during the 2-year period immediately before retirement. However, there is no support in the statutory language or legislative history of the Act for such an approach. Accordingly, the proposed regulation is adopted in final form without the suggested changes.

With regard to § 1627.17(e), in accord with the statutory language and the legislative history, the proposed regulation excluded from the calculation of qualified retirement benefits amounts attributable to Social Security, employee contributions, rollovers and contributions of prior employers.

The proposed regulation did not set forth any special rules explaining how amounts attributable to Social Security are to be calculated. These amounts appear to be readily determinable. Since no comments were received with regard to the handling of Social Security, the regulation in paragraph (1) was adopted without change.

Excluding amounts attributable to employee contributions required further explanation. In this regard, the proposed regulation generally followed Section 411(c) of the Internal Revenue Code (as added to the Code by the Employee Retirement Income Security Act of 1974 (ERISA)), and the Treasury regulations thereunder.

Commenters favored the Commission's reliance on the principles in Section 411(c) and the Treasury regulations. However, a number of comments pointed out a deviation from those principles and requested that the proposed regulation be changed to conform. Specifically, proposed

§ 1627.17(e)(2)(ii)(B) required that, in determining the amounts attributable to employee contributions under a defined benefit plan for which separate accounts are not maintained, interest at the rate of 5 percent be credited to the employee's contributions "from the time each such contribution was made" until the date of retirement. On the other hand, the Internal Revenue Code/ERISA provision requires that 5 percent interest be credited on and after the January 1, 1976 effective date of ERISA and, for periods up to that date, requires only that interest be credited at the rate (if any) specified under the plan as then in existence. Since there does not appear to be any reason why the same rule should not apply under the ADEA, the final regulation adopts the distinction between the crediting of interest before and after the date a plan became subject to ERISA.

The proposed regulation also dealt with the issue of excluding contributions by prior employers from the determination of the value of the retirement benefits. The purpose of this restriction, according to the legislative history, is to assure that "the employee's retirement income will be adjusted to reflect the level of retirement income actually provided by the employer wishing to initiate compulsory retirement." S. Rept. No. 95–493, p. 8.

The contributions to the pension, profit-sharing, savings, or deferred compensation plan made by the employer which actually makes the decision to force the employee to retire may be counted, as the legislative history makes clear. The proposed regulation added to this test the further requirement that the employer which in fact forces the employee to retire must be the employer which customarily and regularly makes such decisions. This second requirement was intended to close what was seen as a loophole. For example, if a subsidiary of a parent corporation customarily and regularly makes its own decisions about whether to discharge employees (and institute other important personnel actions), the subsidiary might ask the parent to force an employee to retire on account of age so that both parent and subsidiary would be deemed the last employer, with the result that pension contributions made by both could be counted towards the $27,000. The proposed regulation closed this loophole.

Numerous commenters objected to the second requirement. They agreed that Congress intended to exclude from the calculation of qualified retirement benefits those amounts provided by prior employers unrelated to the current employer. However, they contended that there was no evidence of congressional intent to preclude the aggregating of retirements benefits accrued by an employee while in the employ of affiliated companies, such as parents and subsidiaries, and brother and sister corporations.

In this connection, it is a well-established fact that employees are frequently transferred between parent and subsidiary companies, or among brother and sister corporations within a family of business organizations, as a part of normal executive development. In this way, the employees learn first-hand about many of the various business activities of the entire family of companies and thereby tend to enhance their opportunities for promotion to greater responsibilities and higher income. Under the proposed interpretation, however, because of the way in which it distinguished current from prior employers, these very employees would be much less likely to fall within the exemption than would employees who spend their entire careers with a single subsidiary or other business unit and never work elsewhere in the family of companies. After considering these and similar anomalies, the Commission has concluded that there is no purpose of the exemption which would be served by allowing the bona fide executive who stays with one entity of the business family to fall within the exemption, while preventing the exemption from applying to the bona fide executive who is identical in every respect except for having moved around among various entities within the same family companies.

The largest number of comments on this issue suggested that because the exemption itself relies on concepts taken from the Internal Revenue Code and ERISA, the Commission should adopt the special "controlled group" rule under Section 414(b), 414(c) and 415(h) of the Internal Revenue Code (26 U.S.C. 414(b), 414(c) and 415(h)) and Section 210(c) and 210(d) of ERISA (29 U.S.C. 1060(c) and 1060(d)). Those subsections provide in substance that retirement benefits accrued while in the employ of affiliated corporations, partnerships, proprietorships and all other trades or businesses, which have at least a 50 percent ownership in common, are required to be aggregated and considered as if accrued in the employ of a single employer.

In the final interpretation, the Department does adopt the "controlled group" approach. This is a well-known concept under the Internal Revenue Code and ERISA; it better reflects economic realities among executives and high policymakers; and it avoids many anomalies that the proposed interpretation would have lead to. However, it should be noted that this special use of the term "employer" in the Section 12(c) exemption does not affect the normal meaning of the term elsewhere in the ADEA, as defined in Section 11(b) and as construed by the courts.

§ 1625.12(a)

The proposed interpretation as originally published set forth the text of the exemption in Section 12(c)(1) of the Act. This remains the same in the final interpretation.

§ 1625.12(b)

The proposed interpretation set forth two well established principles of statutory construction: That exemptions from remedial legislation must be narrowly construed, and that persons seeking to invoke such an exemption must prove that every element has been clearly and unmistakable met. This subsection remains unchanged in the final version.

§ 1625.12(c)

The proposed interpretation dealt with the issue of whether employees who fall within the exemption may be offered a change in position or status which is short of forced retirement, and which therefore allows them to remain as employees. The statutory test by its terms excuses only "compulsory retirement." However, if this language were interpreted literally, it would lead to the anomalous result that an employer having an employee within the exemption would be able to force the employee to retire, but would not be able to offer the employee a position of lesser status or (in the case of a full-time employee) a part-time position.

The Commission does not believe that the exemption was intended to lead to such a situation. In light of these considerations, where an employee falls within the exemption the Commission will not question an offer of a position of lesser status, conversion to part-time status, or other change in position or status short of forced retirement, provided that the employee voluntarily accepts this new position or status, and that he or she is thereafter treated no less favorably than similarly situated younger employees.

Several commenters suggested that the proposed interpretation be modified to permit the forced retirment (at any time after age 65) of an employee who was subject to the exemption but who, in order to avoid retirement after attaining age 65, accepted a job which is not a bona fide executive or a high policymaking position. The Commission does not adopt the suggested change in the final interpretation. While the exemption does not require an employer to offer an employee a job with reduced status in lieu of mandatory retirement, neither does it permit an employer to discriminate against an employee who voluntarily accepts such a job, and thereby removes himself or herself from the exemption.

§ 1625.12 (d), (e)

The proposed interpretation of paragraph (1) of the exemption adopted most of the joint explanatory statement of the House and Senate conferees contained in the Conference Committee Report (H.R. Rept. No. 95–950, pp. 8–10). That statement consists largely of a description of the kinds of "executive" and "high policy-making" employees intended to be exempted by the provision. While this description provides a general indication of what kinds of employees are exempt, it does not purport to indicate in every instance whether or not the exemption may apply.

In the supplementary information accompanying the proposed interpretation, the Commission therefore requested comments on the desirability of describing "executive" employees in terms of an annual dollar volume test for the establishment or department supervised or in terms of a minimum number of employees supervised. 43 FR 58148–58149 (Dec. 12, 1978). Only a few comments were received, several objecting to any such descriptive definition. Two commenters did suggest that the top 2 or 3 percent of employees in any company be treated as executives for purposes of the exemption. On further inquiry, however, it appears that the number of executive positions may be substantially lower than that in many large manufacturing concerns, but substantially higher in some small professional services firms. Since insufficient data was a series of concrete examples of employees subject to the exemption, the proposed interpretation is continued without change.

§ 1625.12(f)

The proposed interpretation followed the statutory requirement that an employee must have been in a bona fide executive or high policy-making position, within the meaning of the exemption, "for the 2–year period immediately before retirement * * *." This requirement, according to the legislative history, prevents an employer from placing an employee within such a position just before age 65 (or any other age less than 70) in order to be able to force the employee to retire on account of age (Conference Report, p. 9).

In response to questions posed by one comment, the final interpretation makes clear that an employee who holds two or more different positions during the 2–year period is subject to the exemption only if each such job is an executive or high policymaking position.

§ 1625.12(g)

The proposed interpretation referred to the statement in the Conference Committee Report that the exemption is not applicable to Federal employees covered by Section 15 of the Act (H.R. Rept. No. 95–950, p. 10). The final version is unchanged.

§ 1625.12(h)

The proposed interpretation stated that the "annual retirement benefit," referred to in the exemption, is the sum of qualified benefits received during each one-year period from the date on which such benefits first become receivable by the retiree. There were no comments regarding the proposed interpretation, which is adopted without change.

§1625.12(i)

The proposed interpretation required that benefit payments, in order to be counted towards the $27,000 annual minimum, must be made or commence within 60 days after the employee's retirement. This provision was intended to give reasonable meaning to the statutory requirement that the employee be entitled to "immediate" payment of the annual retirement benefit.

Many commenters advocated that the Commission adopt instead the rule under ERISA. Under ERISA, benefit payments must begin not later than 60 days *after the close of a specified plan year* (depending upon the age of the employee, years of participation in the plan, or date of termination of service) (see section 206(a) of ERISA and section 401(a)(14) of the Internal Revenue Code, as added by section 1021(d) of ERISA). the 60-day period starts running at the end of the plan year, and not at the date of retirement, in order to avoid any disruption in those plans which begin benefits for all retired employees on the same date.

However, if this same rule were applied under the ADEA exemption, a bona fide executive or high policymaking employee who is forced to retire because of age might have to wait as long as 14 months to receive any benefits, depending on how early in the plan year he or she was forced to retire. This result would be contrary to the ADEA's requirement that the $27,000 annual retirement benefit be an "immediate" one. Under the Commission's ADEA interpretation, if an employee within the exemption were a participant in a plan providing for benefit payments within 60 days after the end of the plan year, the employee could not be forced to retire until the last day of the plan year. However, as the final interpretation also provides, an employee who is entitled to receive benefits within 60 days after retiring would not be removed from the exemption where he or she freely elects to start receiving benefits at some later time.

§ 1625.12(k)

The proposed interpretation dealt with the statutory requirement that the annual retirement benefit be "nonforfeitable."

Commentators have expressly requested the Commission to reconcile the proposed interpretation with section 411(a)(3) of the Internal Revenue Code (26 U.S.C. 411(a)(3)). Under section 411(a)(3), retirement benefits derived from employer contributions are not treated as forfeitable solely because the plan provides that such benefits are discontinued in certain situations on account of death, or suspended during certain periods of reemployment. Nor does section 411(a)(3) treat such benefits as forfeitable under certain limited circumstances where retroactive amendments to the plan are permitted in order to decrease plan liabilities. Finally, under section 411(a)(3), benefits derived from employer contributions are not treated as forfeitable where, under statutorily specified circumstances, the plan participant, in withdrawing his or her own mandatory contributions, thereby loses the right to receive the employer's contributions.

The proposed interpretations did not refer to these exceptions. However, the exceptions are specifically permitted by the Internal Revenue Code (as amended by ERISA) and are not irreconcilable with the term "nonforfeitable" as used in section 12(c) of the ADEA. Accordingly, the Commission has chosen to adopt these section 411(a)(3) exceptions in its interpretation.

Another issue raised by the commenters is the effect of the nonforfeitability requirement on unfunded deferred compensation plans. Paragraph (1) of proposed § 1625.12(k) stated that if an employee is subject to plan provisions which could cause the cessation of payments to a retiree or could reduce payments below $27,000, then the exemption would not apply. The commenters noted, however, that many unfunded deferred compensation plans are subject to forfeiture clauses in order to assure, for tax purposes, that the money promised under the plan will not be deemed to have been "constructively received" prior to retirement. (Where the money is deemed to be "constructively received" prior to retirement, it is considered as current income, rather than deferred income.)

The Commission does not believe that this comment necessitates any change in its proposed interpretation. The interpretation deals only with forfeiture clauses which could reduce or eliminate money paid to employees *after retirement;* it does not deal with forfeiture clauses which affect employees *before retirement.* As a result, clauses which provide for forfeiture of funds before retirement (and thereby avoid "constructive receipt" problems) could still be included in deferred compensation plans. However, where any money is in fact forfeited prior to retirement pursuant to such a clause, it is clear that none of the forfeited funds could be counted towards the $27,000 statutory requirement.

Paragraph (2) of the proposed interpretation stated that "as of the effective date of the retirement in question, there must be at least a reasonable expectation that the plan will be sufficiently *funded* to meet its obligations" (emphasis added). Several commenters questioned how the proposed interpretation would apply to those deferred compensation plans which are unfunded.

An employee who participates in an unfunded deferred compensation plan does not have an individual account in which retirement funds are placed over the years, nor does the employer necessarily set aside funds periodically for the employee's benefit to cover the promised future payment. Deferred compensation plans tend to be unfunded for the same reason that they are subject to contingencies which can result in their forfeiture prior to retirement—to assure that the employee will not be deemed to have "constructively received" any funds prior to retirement. If no money is set aside for the benefit of the employee prior to retirement, there is no money which can be "constructively received."

In light of this situation, the requirement in the proposed interpretation that the plan be sufficiently "funded" could well write all unfunded deferred compensation plans out of the exemption. The Commission believes that this would be contrary to congressional intent. Such unfunded plans are generally provided for the very key top executives for whom the exemption was designed. Moreover, where there is a reasonable expectation that the plan will pay the promised benefit, the Commission does not believe that employers providing such unfunded plans should be required to set aside funds earmarked for the employee in question. The interpretation has therefore been changed to state that there must be "at least a reasonable expectation that the plan will meet its obligations," thereby leaving out the previous reference to funding.

This document was originally prepared under the direction of the Deputy Administrator, Wage and Hour Division of the Department of Labor with the assistance of the Office of the Solicitor and the concurrence of the Office of the General Counsel of the Equal Employment Opportunity Commission. In addition, in accordance with Executive Order 12067, the Commission has solicited the views of affected Federal agencies.

Signed at Washington, D.C., this 14th day of November 1979.

For the Commission.

Eleanor Holmes Norton,

Chair, Equal Employment Opportunity Commission.

Accordingly, new §§ 1625.11, 1625.12, 1627.17, and new paragraph (c) of § 1627.1 are added to Title 29, Code of Federal Regulations.

Subpart A—General

§ 1627.1 Purpose and scope.

* * * * *

(c) Subpart D of this part sets forth the Commission's regulations issued pursuant to section 12(c)(2) of the Act, providing that the Secretary of Labor, after consultation with the Secretary of the Treasury, shall prescribe the manner of calculating the amount of qualified retirement benefits for purposes of the exemption in section 12(c)(1) of the Act.

* * * * *

Subpart D—Statutory Exemption

§ 1627.17 Calculating the amount of qualified retirement benefits for purposes of the exemption for bona fide executives or high policymaking employees.

(a) Section 12(c)(1) of the Act, added by the 1978 amendments, provides: "Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $27,000." The Commission's interpretative statements regarding this exemption are set forth in § 1625 of this chapter.

(b) Section 12(c)(2) of the Act provides:

> In applying the retirement benefit test of paragraph (a) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(c)(1) The requirement that an employee be entitled to the equivalent of a $27,000 straight life annuity (with no ancillary benefits) is satisfied in any case where the employee has the option of receiving, during each year of his or her lifetime following retirement, an annual payment of at least $27,000, or periodic payments on a more frequent basis which, in the aggregate, equal at least $27,000 per year: *Provided, however,* That the portion of the retirement income figure attributable to Social Security, employee contributions, rollover contributions and contributions of prior employers is excluded in the manner described in paragraph (e) of this section. (A retirement benefit which excludes these amounts is sometimes referred to herein as a "qualified" retirement benefit.)

(2) The requirement is also met where the employee has the option of receiving, upon retirement, a lump sum payment with which it is possible to purchase a single life annuity (with no ancillary benefits) yielding at least $27,000 per year as adjusted.

(3) The requirement is also satisfied where the employee is entitled to receive, upon retirement, benefits whose aggregate value, as of the date of the employee's retirement, with respect to those payments which are scheduled to be made within the period of life expectancy of the employee, is $27,000 per year as adjusted.

(4) Where an employee has one or more of the options described in paragraphs (c) (1)–(3) of this section, but instead selects another option (or

options), the test is also met. On the other hand, where an employee has no choice but to have certain benefits provided after his or her death, the value of these benefits may not be included in this determination.

(5) The determination of the value of those benefits which may be counted towards the $27,000 requirement must be made on the basis of reasonable actuarial assumptions with respect to mortality and interest. For purposes of excluding from this determination any benefits which are available only after death, it is not necessary to determine the life expectancy of each person on an individual basis. A reasonable actuarial assumption with respect to mortality will suffice.

(6) The benefits computed under paragraphs (c)(1), (2) and (3) of this section shall be aggregated for purposes of determining whether the $27,000 requirement has been met.

(d) The only retirement benefits which may be counted towards the $27,000 annual benefit are those from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans. Such plans include, but are not limited to, stock bonus, thrift and simplified employee pensions. The value of benefits from any other employee benefit plans, such as health or life insurance, may not be counted.

(e) In calculating the value of a pension, profit-sharing, savings, or deferred compensation plan (or any combination of such plans), amounts attributable to Social Security, employee contributions, contributions of prior employers, and rollover contributions must be excluded. Specific rules are set forth below.

(1) *Social Security.* Amounts attributable to Social Security must be excluded. Since these amounts are readily determinable, no specific rules are deemed necessary.

(2) *Employee contributions.* Amounts attributable to employee contributions must be excluded. The regulations governing this requirement are based on section 411(c) of the Internal Revenue Code and Treasury Regulations thereunder (§ 1.411(c)-(1)), relating to the allocation of accrued benefits between employer and employee contributions. Different calculations are needed to determine the amount of employee contributions, depending upon whether the retirement income plan is a defined contribution plan or a defined benefit plan. Defined contribution plans (also referred to as individual account plans) generally provide that each participant has an individual account and the participant's benefits are based solely on the account balance. No set benefit is promised in defined contribution plans, and the final amount is a result not only of the actual contributions, but also of other factors, such as investment gains and losses. Any retirement income plan which is not an individual account plan is a defined benefit plan. Defined benefit plans generally provide a definitely determinable benefit, by specifying either a flat monthly payment or a schedule of payments based on a formula (frequently involving salary and years of service), and they are funded according to actuarial principles over the employee's period of participation.

(i) *Defined contribution plans.*—(A) *Separate accounts maintained.* If a separate account is maintained with respect to an employee's contributions and all income, expenses, gains and losses attributable thereto, the balance in such an account represents the amount attributable to employee contributions.

(B) *Separate accounts not maintained.* If a separate account is not maintained with respect to an employee's contributions and the income, expenses, gains and losses attributable thereto, the proportion of the total benefit attributable to employee contributions is determined by multiplying that benefit by a fraction—

(1) The numerator of which is the total amount of the employee's contributions under the plan (less withdrawals), and

(2) The denominator of which is the sum of the numerator and the total contributions made under the plan by the employer on behalf of the employee (less withdrawals).

Example: A defined contribution plan does not maintain separate accounts for employee contributions. An employee's annual retirement benefit under the plan is $40,000. The employee has contributed $96,000 and the employer has contributed $144,000 to the employee's individual account; no withdrawals have been made. The amount of the $40,000 annual benefit attributable to employee contributions is $40,000×$96,000/$96,000+$144,000=$16,000. Hence the employer's share of the $40,000 annual retirement benefit is $40,000 minus $16,000 or $24,000—too low to fall within the exemption.

(ii) *Defined benefit plans*—(A) *Separate accounts maintained.* If a separate account is maintained with respect to an employee's contributions and all income, expenses, gains and losses attributable thereto, the balance in such an account represents the amount attributable to employee contributions.

(B) *Separate accounts not maintained.* If a separate account is not maintained with respect to an employee's contributions and the income, expenses, gains and losses attributable thereto, all of the contributions made by an employee must be converted actuarially to a single life annuity (without ancillary benefits) commencing at the age of forced retirement. An employee's accumulated contributions are the sum of all contributions (mandatory and, if not separately accounted for, voluntary) made by the employee, together with interest on the sum of all such contributions compounded annually at the rate of 5 percent per annum from the time each such contribution was made until the date of retirement. *Provided, however,* That prior to the date any plan became subject to section 411(c) of the Internal Revenue Code, interest will be credited at the rate (if any) specified in the plan. The amount of the employee's accumulated contribution described in the previous sentence must be multiplied by an "appropriate conversion factor" in order to convert it to a single life annuity (without ancillary benefits) commencing at the age of actual retirement. The appropriate conversion factor depends upon the age of retirement. In accordance with Rev. Rul. 76-47, 1976-2 C.B. 109, the following conversion factors shall be used with respect to the specified retirement ages:

Retirement age:	*Conversion factor percent*
65 through 66	10
67 through 68	11
69	12

Example: An employee is scheduled to receive a pension from a defined benefit plan of $50,000 per year. Over the years he has contributed $150,000 to the plan, and at age 65 this amount, when contributions have been compounded at appropriate annual interest rates, is equal to $240,000. In accordance with Rev. Rul. 76-47, 10 percent is an appropriate conversion factor. When the $240,000 is multiplied by this conversion factor, the product is $24,000, which represents that part of the $50,000 annual pension payment which is attributable to employee contributions. The difference—$26,000—represents the employer's contribution, which is too low to meet the test in the exemption.

(3) *Contributions of prior employers.* Amounts attributable to contributions of prior employers must be excluded.

(i) *Current employer distinguished from prior employers.* Under the section 12(c) exemption, for purposes of excluding contributions of prior employers, a prior employer is every previous employer of the employee except those previous employers which are members of a "controlled group of corporations" with, or "under common control" with, the employer which forces the employee to retire, as those terms are used in sections 414 (b) and 414(c) of the Internal Revenue Code, as modified by section 414(h) (26 U.S.C. 414(b), (c) and (h)).

(ii) *Benefits attributable to current employer and to prior employers.* Where the current employer maintains or contributes to a plan which is separate from plans maintained or contributed to by prior employers, the amount of the employee's benefit attributable to those prior employers can be readily determined. However, where the current employer maintains or contributes to the same plan as prior employers, the following rule shall apply. The benefit attributable to the current employer shall be the total benefit received by the employee, reduced by the benefit that the employee would have received from the plan if he or she had never worked for the current employer. For purposes of this calculation, it shall be assumed that all benefits have always been vested, even if benefits accrued as a result of service with a prior employer had not in fact been vested.

(4) *Rollover contributions.* Amounts attributable to rollover contributions must be excluded. For purposes of § 1627.17(e), a rollover contribution (as defined in sections 402(a)(5), 403(a)(4), 408(d)(3) and 409(b)(3)(C) of the Internal Revenue Code) shall be treated as an employee contribution. These amounts have already been excluded as a result of the computations set forth in § 1627.17(e)(2). Accordingly, no separate calculation is necessary to comply with this requirement.

§ 1625.11 Exemption for employees serving under a contract of unlimited tenure.

(a)(1) Section 12(d) of the Act, added by the 1978 amendments, provides: "Nothing in this act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965)."

(2) This exemption from the Act's protection of covered individuals took effect on January 1, 1979, and is repealed on July 1, 1982 (see sections 3(b)(1) and 3(b)(3) of the Age Discrimination in Employment Act Amendments of 1978, Pub. L. 95–256, 92 Stat. 189). Individuals who attain age 65 prior to July 1, 1982 and all of whose job duties and responsibilities cease prior to that date will not be considered outside the exemption merely because their contract (or similar arrangement) providing for unlimited tenure expires on or after July 1, 1982.

(b) Since section 12(d) is an exemption from the nondiscrimination requirements of the Act, the burden is on the one seeking to invoke the exemption to show that every element has been clearly and unmistakably met. Moreover, as with other exemptions from the ADEA, this exemption must be narrowly construed.

(c) Section 1201(a) of the Higher Education Act of 1965, as amended by 20 U.S.C. 403(b), provides in pertinent part:

The term "institution of higher education" means an educational institution in any state which (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such certificate, (2) is legally authorized within such State to provide a program of education beyond secondary education, (3) provides an educational program for which it awards a bachelor's degree or provides not less than a two-year program which is acceptable for full credit toward such a degree, (4) is a public or other nonprofit institution, and (5) is accredited by a nationally recognized accrediting agency or association approved by the Commissioner (of Education) for this purpose or, if not so accredited, (A) is an institution with respect to which the Commissioner has determined that there is satisfactory assurance, considering the resources available to the institution, the period of time if any, during which it has operated, the effort it is making to meet accreditation standards, and the purpose for which this determination is being made, that the institution will meet the accreditation standards of such an agency or association within a reasonable time, or (B) is an institution whose credits are accepted on transfer by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited.* * *

The definition encompasses almost all public and private universities and two- and four-year colleges. The omitted portion of the text of section 1201(a) refers largely to one-year technical schools, which generally do not grant tenure to employees, but which, if they do, are also eligible to claim the exemption.

(d)(1) Use of the term "any employee" indicates that application of the exemption is not limited to teachers, who are traditional recipients of tenure. The exemption may also be available with respect to other groups, such as academic deans, scientific researchers, professional librarians and counseling staff, who frequently have tenured status.

(2) The Conference Committee Report on the 1978 amendments expressly states that the exemption does not apply to Federal employees covered by section 15 of the Act (H.R. Rept. No. 95–950, p. 10).

(e)(1) The phrase "unlimited tenure" is not defined in the Act. However, the almost universally accepted definition of academic "tenure" is an arrangement under which certain appointments in an institution of higher education are continued until retirement for age of physical disability, subject to dismissal for adequate cause or under extraordinary circumstances on account of financial exigency or change of institutional program. Adopting that definition, it is evident that the word "unlimited" refers to the duration of tenure. Therefore, a contract (or other similar arrangement) which is limited to a specific term (for example, one year or 10 years) will not meet the requirements of the exemption.

(2) The legislative history shows that Congress intented the exemption to apply only where the minimum rights and privileges traditionally associated with tenure are guaranteed to an employee by contract or similar arrangement. While tenure policies and practices vary greatly from one institution to another, the minimum standards set forth in the 1940 Statement of Principles on Academic Freedom and Tenure, jointly developed by the Association of American Colleges and the American Association of University Professors, have enjoyed widespread adoption or endorsement. The 1940 Statement of Principles on academic tenure provides as follows:

(a) After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

(1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consumated.

(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least

one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.

(3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have.

(4) Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an advisor of his own choosing who may act as counsel.There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.

(5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

(3) A contract or similar arrangement which meets the standards in the 1940 Statement of Principles will satisfy the tenure requirements of the exemption. However, a tenure arrangement will not be deemed inadequate solely because it fails to meet these standards in every respect. For example, a tenure plan will not be deemed inadequate solely because it includes a probationary period somewhat longer than seven years. Of course, the greater the deviation from the standards in the 1940 Statement of Principles, the less likely it is that the employee in question will be deemed subject to "unlimited tenure" within the meaning of the exemption. Whether or not a tenure arrangement is adequate to satisfy the requirements of the exemption must be determined on the basis of the facts of each case.

(f) Employees who are not assured of a continuing appointment either by contract of unlimited tenure or other similar arrangement (such as a state statute) would not, of course, be exempted from the prohibitions against compulsory retirement, even if they perform functions identical to those performed by employees with appropriate tenure.

(g) An employee within the exemption can lawfully be forced to retire on account of age at age 65 or above. In addition, the employer is free to retain such employees, either in the same position or status or in a different position or status: *Provided*, That the employee voluntarily accepts this new position or status. For example, an employee who falls within the exemption may be offered a nontenured position or part-time employment. An employee who accepts a nontenured position or part-time employment, however, may not be treated any less favorably, on account of age, than any similarly situated younger employee (unless such less favorable treatment is excused by an exception to the Act).

§ 1625.12 Exemption for bona fide executive or high policymaking employees.

(a) Section 12(c)(1) of the Act, added by the 1978 amendments, provides: "Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee which equals, in the aggregate, at least $27,000."

(b) Since this provision is an exemption from the non-discrimination requirements of the Act, the burden is on the one seeking to invoke the exemption to show that every element has been clearly and unmistakably met. Moreover, as with other exemptions from the Act, this exemption must be narrowly construed.

(c) An employee within the exemption can lawfully be forced to retire on account of age at age 65 or above. In addition, the employer is free to retain such employees, either in the same position or status or in a different position or status. For example, an employee who falls within the exemption may be offered a position of lesser status or a part-time position. An employee who accepts such a new status or position, however, may not be treated any less favorably, on account of age, than any similarly situated younger employee.

(d)(1) In order for an employee to qualify as a "bona fide executive," the employer must initially show that the employee satisfies the definition of a bona fide executive set forth in § 541.1 of this chapter. Each of the requirements in paragraphs (a) through (e) of § 541.1 must be satisfied, regardless of the level of the employee's salary or compensation.

(2) Even if an employee qualifies as an executive under the definition in § 541.1 of this chapter, the exemption from the ADEA may not be claimed unless the employee also meets the further criteria specified in the Conference Committee Report in the form of examples (see H.R. Rept. No. 95–950, p. 9). The examples are intended to make clear that the exemption does not apply to middle-management employees, no matter how great their retirement income, but only to a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business. As stated in the Conference Report (H.R. Rept. No. 95–950, p. 9):

> Typically the head of a significant and substantial local or regional operation of a corporation [or other business organization], such as a major production facility or retail establishment, but not the head of a minor branch, warehouse or retail store, would be covered by the term "bona fide executive." Individuals at higher levels in the corporate organizational structure who possess comparable or greater levels of responsibility and authority as measured by established and recognized criteria would also be covered.
>
> The heads of major departments or divisions of corporations [or other business organizations] are usually located at corporate or regional headquarters. With respect to employees whose duties are associated with corporate headquarters operations, such as finance, marketing, legal, production and manufacturing (or in a corporation organized on a product line basis, the management of product lines), the definition would cover employees who head those divisions.
>
> In a large organization the immediate subordinates of the heads of these divisions sometimes also exercise executive authority, within the meaning of this exemption. The conferees intend the definition to cover such employees if they possess responsibility which is comparable to or greater than that possessed by the head of a significant and substantial local operation who meets the definition.

(e) The phrase "high policymaking position," according to the Conference Report (H.R. Rept. No. 95–950, p. 10), is limited to "* * * certain top level employees who are not 'bona fide executives' * * *." Specifically, these are:

> * * * individuals who have little or no line authority but whose position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend the implementation thereof.
>
> For example, the chief economist or the chief research scientist of a corporation typically has little line authority. His duties would be primarily intellectual as opposed to executive or managerial. His responsibility would be to evaluate significant economic or

scientific trends and issues, to develop and recommend policy direction to the top executive officers of the corporation, and he would have a significant impact on the ultimate decision on such policies by virtue of his expertise and direct access to the decisionmakers. Such an employee would meet the definition of a "high policymaking" employee.

On the other hand, as this description makes clear, the support personnel of a "high policymaking" employee would not be subject to the exemption even if they supervise the development, and draft the recommendation, of various policies submitted by their supervisors.

(f) In order for the exemption to apply to a particular employee, the employee must have been in a "bona fide executive or high policymaking position," as those terms are defined in this section, for the two-year period immediately before retirement. Thus, an employee who holds two or more different positions during the two-year period is subject to the exemption only if each such job is an executive or high policymaking position.

(g) The Conference Committee Report expressly states that the exemption is not applicable to Federal employees covered by section 15 of the Act (H.R. Rept. No. 95-950, p. 10).

(h) The "annual retirement benefit," to which covered employees must be entitled, is the sum of amounts payable during each one-year period from the date on which such benefits first become receivable by the retiree. Once established, the annual period upon which calculations are based may not be changed from year to year.

(i) The annual retirement benefit must be immediately available to the employee to be retired pursuant to the exemption. For purposes of determining compliance, "immediate" means that the payment of plan benefits (in a lump sum or the first of a series of periodic payments) must occur not later than 60 days after the effective date of the retirement in question. The fact that an employee will receive benefits only after expiration of the 60-day period will not preclude his retirement pursuant to the exemption, if the employee could have elected to receive benefits within that period.

(j)(1) The annual retirement benefit must equal, in the aggregate, at least $27,000. The manner of determining whether this requirement has been satisfied is set forth in § 1627.17(c).

(2) In determining whether the aggregate annual retirement benefit equals at least $27,000, the only benefits which may be counted are those authorized by and provided under the terms of a pension, profit-sharing, savings, or deferred compensation plan. (Regulations issued pursuant to section 12(c)(2) of the Act, regarding the manner of calculating the amount of qualified retirement benefits for purposes of the exemption, are set forth in § 1627.17 of this Chapter.)

(k)(1) The annual retirement benefit must be "nonforfeitable." Accordingly, the exemption may not be applied to any employee subject to plan provisions which could cause the cessation of payments to a retiree or result in the reduction of benefits to less than $27,000 in any one year. For example, where a plan contains a provision under which benefits would be suspended if a retiree engages in litigation against the former employer, or obtains employment with a competitor of the former employer, the retirement benefit will be deemed to be forfeitable. However, retirement benefits will not be deemed forfeitable solely because the benefits are discontinued or suspended for reasons permitted under section 411(a)(3) of the Internal Revenue Code.

(2) An annual retirement benefit will not be deemed forfeitable merely because the minimum statutory benefit level is not guaranteed against the possibility of plan bankruptcy or is subject to benefit restrictions in the event of early termination of the plan in accordance with Treasury Regulation 1.401-4(c). However, as of the effective date of the retirement in question, there must be at least a reasonable expectation that the plan will meet its obligations.

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DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 724

Revision of Naval Discharge Review Board Regulations

AGENCY: Department of the Navy, Department of Defense.

ACTION: Final rule.

SUMMARY: This rule revises the Navy regulations governing the functions and procedures of the Naval Discharge Review Board. This revision reflects the provisions of Part 70 of Title 32, Code of Federal Regulations, Pub. L. 95-126, Assistant Secretary of the Navy (Manpower, Reserve Affairs, and Logistics) memorandum of March 30, 1978, (FR Doc. 78-11025 published at FR page 17355 on April 24, 1978), and it also reflects the refinement of certain changes to the discharge review regulations made pursuant to a District Court approved settlement. This revision is intended to provide more comprehensive guidance for the Naval Discharge Review Board and for those who bring matters before it.

EFFECTIVE DATE: The Department of the Navy Manual for Discharge Review, 1979, is effective from April 19, 1979, and is applicable to all cases pending before the Naval Discharge Review Board as well as to new applications.

FOR FURTHER INFORMATION CONTACT: Rear Admiral John M. Delargy, U.S. Navy, Director, Naval Council of Personnel Boards, Room 911, 801 North Randolph Street, Arlington, Virginia 22203, telephone number (202) 696-4355.

SUPPLEMENTARY INFORMATION: Under the authority of 10 U.S.C. 1553, the Secretary of the Navy has established the Naval Discharge Review Board and has, from time to time, promulgated regulations governing the functions and procedures of the Board. On April 19, 1979, the Secretary approved the Department of the Navy Manual for Discharge Review, 1979, revising the prior direction contained in Part 724 of Title 32, Code of Federal Regulations (1978). The revised Naval Discharge Review Board instruction prescribes Naval Discharge Review Board organization, the authority and jurisdiction of the Naval Discharge Review Board, policy and procedure pertaining to the review of discharges from the naval service, designates and directs the Naval Discharge Review Board to make final determination as to whether discharges from the naval service should be changed and the nature of the change, if warranted, and revises procedures for those decisions of the Naval Discharge Review Board to be reviewed by the Secretary. By this revision a petitioner may submit contentions and/or issues of fact, law, or discretion at any time prior to the Board's consideration of the case, and the Board is required to provide appropriate statements of its findings, reasons and conclusions. Since these rules specify Naval Discharge Review Board procedures to be followed and since no substantive comments were received in response to the notice of rulemaking published April 8, 1977, and since many of these changes are required under the provisions of Part 70 of Title 32, Code of Federal Regulations, and Pub. L. 95-126, and reflect refinements of certain changes to the discharge review regulations made pursuant to a stipulation of dismissal approved by the United States District Court for the District of Columbia on